



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

December 17, 2020

Office of Governor Ron DeSantis
State of Florida
The Capitol
400 South Monroe St.
Tallahassee, Florida 32399-0001

Subject: Notice of Approval of Florida's Assumption of the Clean Water Act Section 404 Program

Dear Governor DeSantis:

The Environmental Protection Agency (EPA) has concluded its review of Florida's request to assume administration of a Clean Water Act (CWA) Section 404 program. After review of the program and consideration of all comments received, the EPA has concluded that Florida's program has the necessary authority to operate a CWA Section 404 program in accordance with the requirements found in CWA Sections 404(g-l) and EPA's implementing regulations. Therefore, I am very pleased to inform you that Florida's assumption of the CWA Section 404 program is approved. Florida will begin permitting responsibility for these discharges upon publication of EPA's approval in the Federal Register.

We appreciate the significant effort by the Florida Department of Environmental Protection in developing this program and memoranda of agreement that were enclosed with your submission, in coordination with the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, U.S. National Marine Fisheries Service, the State Historic Properties Officer, Tribes, and my staff. EPA looks forward to working with you as you take on this additional responsibility managing the State's waters.

If you have any questions, please do not hesitate to call me at (404) 562-8357 or have a member of your staff contact Ms. Jeanneanne M. Gettle, Director of the Water Division, at (404) 562-9345.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Walker', with a stylized, cursive script.

Mary S. Walker
Regional Administrator

cc: The Honorable Noah Valenstein, Secretary
Florida Department of Environmental Protection

Mr. John Truitt, Deputy Secretary for Regulatory Programs
Florida Department of Environmental Protection



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MEMORANDUM

SUBJECT: State of Florida's Request to Assume a Clean Water Act Section 404 Program -
ACTION MEMORANDUM

FROM: Jeaneanne M. Gettle
Director, Water Division

JEANEANNE GETTLE
Digitally signed by JEANEANNE
GETTLE
Date: 2020.12.16 16:35:51 -05'00'

TO: Mary S. Walker
Regional Administrator

DISCUSSION:

Background

The Clean Water Act (CWA) Section 404 authorizes the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into waters of the United States. CWA Section 404(g) allows a state or tribe to submit to EPA a request to assume administration of a Section 404 program in certain waters within the state's or tribe's jurisdiction.

On August 20, 2020, EPA received from the Governor of the State of Florida a program submission for regulating discharges of dredged or fill material into certain waters within the jurisdiction of the State in accordance with CWA Section 404(g-l). Receipt of the submission initiated a 120-day review of the proposed State program. During that period, EPA determined that the program submission was complete and subsequently solicited comments from members of the public as well as from the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS). EPA also initiated and completed consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the Poarch Band of Creek Indians in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes¹ and the EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights² (collectively, EPA Tribal Policies). Concurrent with its actions on the program submittal, EPA consulted under Section 7 of the Endangered Species Act (ESA) with the USFWS, and under Section 106 of the National Historic Preservation Act (NHPA) with a number of parties³ on its decision whether to approve Florida's request to assume a CWA Section 404 program.

Public Participation and Responsiveness Summary

On September 16, 2020, EPA published a Federal Register notice regarding Florida's request for assumption of a Section 404 program. The Federal Register notice informed the public of EPA's receipt of a complete program request submission (85 FR 57853), opened a 47-day public

¹ <https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes>

² <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty>

³ Advisory Council on Historic Preservation, Choctaw Nation of Oklahoma, Florida Department of Environmental Protection, Florida State Historic Preservation Officer, Miccosukee Tribe of Indians of Florida, Muscogee (Creek) Nation, Poarch Band of Creek Indians, and Seminole Tribe of Florida

comment period, and scheduled virtual public hearings. EPA published notice of the State's submission in enough of the largest newspapers in Florida to attract statewide attention (Miami Herald, Orlando Sentinel, Palm Beach Post, Tallahassee Democrat, Tampa Bay Times). EPA also mailed notice to persons known to be interested in such matters. Existing mailing lists from the State of Florida, the Corps, USFWS, and NMFS, as well as EPA's own mailing lists were used as a basis for this mailing. EPA held virtual public hearings on October 21, 2020, and October 27, 2020, and received comments submitted to Docket ID No. EPA-HQ-OW-2018-0640 until November 2, 2020. EPA received and reviewed over 3,000 comments. Comments indicated both support for and opposition to EPA's potential approval of Florida's request to assume a CWA Section 404 program. Commenters supporting the State's assumption of a Section 404 program stated that Florida has run a successful Environmental Resource Program, a previously existing permitting program, which positions it well to assume the Section 404 program, that state-level control likely will improve environmental protections, and that streamlining these two programs would make permitting processes more efficient. Commenters opposing the State's assumption of a Section 404 program expressed several concerns including that Florida lacks sufficient staffing and funding resources, provides inadequate opportunities for public input, and would not provide sufficient protections for threatened and endangered species. After reviewing Florida's program submission and comments received, EPA has concluded that Florida and its Department of Environmental Protection (FDEP) have the necessary authority to assume and operate a program in accordance with the requirements found in CWA Section 404 and 40 C.F.R. Part 233. A summary of the public comments received and the Agency's responses can be found in the December 16, 2020, EPA Response to Comments document.

Tribal Consultation

EPA consulted with three tribes on Florida's CWA Section 404 program submission in accordance with the EPA Tribal Policies (the Miccosukee Tribe of Indians of Florida, the Poarch Band of Creek Indians, and the Seminole Tribe of Florida). EPA also consulted with five tribes under Section 106 of the NHPA (Choctaw Nation of Oklahoma, Miccosukee Tribe of Indians of Florida, Muscogee (Creek) Nation, Poarch Band of Creek Indians, and Seminole Tribe of Florida). EPA also invited three additional tribes (the Alabama-Coushatta Tribe of Texas, the Coushatta Tribe of Louisiana, and the Mississippi Band of Choctaw Indians) to consult under NHPA Section 106, but those three tribes did not engage in consultation, as confirmed in letters dated October 19, 2020. As part of these consultation processes, EPA met individually with each tribe, discussed questions and comments they provided, and reviewed and responded to written comments from each tribe. EPA sent letters to each tribe that respectively described how each of their comments submitted during the NHPA Section 106 consultation process were considered. The letters issued to the Miccosukee Tribe of Indians of Florida, the Poarch Band of Creek Indians, and the Seminole Tribe of Florida also described how each of their comments submitted in accordance with the Tribal Consultation Policies were considered.

BASIS FOR DECISION:

Summary of EPA review and analysis

Upon receipt of Florida's August 20, 2020, request to administer a Section 404 program, EPA reviewed the submission for inclusion of the required elements, as set forth in 40 C.F.R. § 233.10: (a) a letter from the Governor of the state requesting program approval; (b) a complete program description as set forth in 40 C.F.R. § 233.11; (c) an Attorney General's statement or a statement from the attorney for those state or interstate agencies which have independent legal counsel, as set forth in 40 C.F.R. § 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 C.F.R. § 233.13; (e) a Memorandum of Agreement

with the Secretary of the Army, as set forth in 40 C.F.R. § 233.14; and (f) copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures. Consistent with 40 C.F.R. § 233.15, EPA determined that Florida's submission was a complete request for State program approval that met the submittal requirements of 40 C.F.R. § 233.10, and so notified Florida by letter dated August 28, 2020. EPA Region 4 Water Division, EPA Region 4 Office of Regional Counsel, the Office of General Counsel, the Office of Water, and the Office of Enforcement and Compliance Assurance have conducted a thorough review of the submission from Florida in accordance with Section 404(g-1) and have determined that the State's program meets the requirements of the Clean Water Act and implementing regulations. The Agency also considered comments received in writing and at two public hearings, and consulted with tribes pursuant to the EPA Tribal Policies, where required, and Section 106 of the NHPA and its implementing regulations.

Consultations and Consistency Determinations on this Agency Action

EPA determined that approval of Florida's CWA 404 program has the potential to affect federally listed threatened or endangered species or critical habitat and thus consulted with USFWS under Section 7 of the Endangered Species Act. The USFWS provided a Biological Opinion with Incidental Take Statement stating that EPA approval of Florida's assumption of a CWA 404 program in assumable waters is not likely to jeopardize the continued existence of proposed or listed species or destroy or adversely modify designated or proposed critical habitat.

In its April 15, 2020, letter to FDEP, NMFS concluded that ESA-listed species under NMFS' jurisdiction do not occur in waters that are assumable by the State based on the ESA-listed species that were identified at that time as part of this proposed assumption. In a letter to NMFS dated September 2, 2020, EPA confirmed that the list of NMFS species had not changed. In email dated September 3, 2020, NMFS confirmed EPA's determination that approval of Florida's program has no effect on endangered and threatened species under NMFS' jurisdiction.

EPA has determined that approval of Florida's request to assume a CWA Section 404 program is an undertaking and thus consulted under Section 106 of the NHPA with the Advisory Council on Historic Preservation (ACHP), the Florida State Historic Preservation Office (SHPO), FDEP, and five Tribes (Choctaw Nation of Oklahoma, Miccosukee Tribe of Indians of Florida, Muscogee (Creek) Nation, Poarch Band of Creek Indians, and Seminole Tribe of Florida) regarding any potential effects of such approval on historic properties. On December 16, 2020, EPA entered into a programmatic agreement with the ACHP, FDEP, and the Florida SHPO, which, consistent with applicable NHPA regulations, evidences compliance with EPA's responsibilities under Section 106 of the NHPA and its implementing regulations. EPA held a consultation meeting on December 14, 2020, and responded to many of the comments received during the consultation period. On December 16, 2020, EPA responded to all comments received from the consulting parties.

EPA has determined that Florida's CWA Section 404 program will comply with the State's Coastal Zone Management Plan (CZMP) and therefore will not adversely affect the coastal zone, as documented in a Memorandum for the Record (December 16, 2020). Similarly, EPA has determined that its approval of Florida's CWA Section 404 program will have "No Adverse Effects" on Essential Fish Habitat (EFH) pursuant to Section 305(b) of the Magnuson-Stevens Act, as documented in a Memorandum for the Record (December 16, 2020). EPA's determination is based on a comparison of the scope of assumed waters and EFH, as well as an October 30, 2020, letter from the NMFS confirming that EFH consultation was not required.

Federal Agency Comments

EPA provided the Corps, NMFS, and USFWS a copy of Florida's program submission in accordance with 40 C.F.R. § 233.15(d). None of the agencies provided substantive comments on Florida's submission. The Corps provided a letter on November 24, 2020, stating it had no comments on the State program, that it had been working with the State since 2017, that since at least early 2020 it had worked to develop and finalize a Memorandum of Agreement with FDEP, and that it continues to work with FDEP to ensure an efficient transition of permitting responsibilities to FDEP. The NMFS sent a letter on October 30, 2020, indicating it reviewed the submission, cited to the September 3, 2020, concurrence on EPA's determination that approval of Florida's program has no effect on endangered and threatened species under NMFS' jurisdiction, and opined that no consultation under Section 305(b)(4)(A) of the Magnuson-Stevens Act is required if EPA makes a determination that approval of the program will not have adverse impacts on EFH. In a letter dated November 19, 2020, the USFWS stated it had no comments on the State's program and transmitted two signed documents: (1) a signed Biological Opinion concluding consultation pursuant to Section 7 of the ESA on EPA's Action to potentially approve Florida's request to assume a CWA Section 404 program and (2) a signed MOU among Florida Fish and Wildlife Conservation Commission, USFWS, and the FDEP outlining coordination on potential permit impacts on threatened and endangered species and critical habitat.

RECOMMENDATION TO APPROVE: I recommend, with the concurrence of the Acting General Counsel David Fotouhi, Assistant Administrator for the Office of Water David Ross, and Assistant Administrator for the Office of Enforcement and Compliance Assurance Susan Bodine, that you approve the State of Florida's request to assume a CWA Section 404 program.

DISPOSITION: A letter to the Governor of Florida and a letter to the Assistant Secretary of the Army for Civil Works (both with copies to the Secretary of the FDEP, the District Commander of the Corps Jacksonville District, and the EPA Administrator) have been prepared and uploaded to CMS for the signature of the Regional Administrator (see attachments). Please sign the attached Federal Register Notice of Decision. Please return signed copies of this Action Memorandum and the signed Federal Register Notice of Decision to me to be added to the record.

DEADLINE: A decision to approve or deny Florida's request to assume and operate a CWA Section 404 program is statutorily required by December 17, 2020. Therefore, letters giving notice of the decision should be signed and sent to the State of Florida and Corps on or before December 17, 2020.

SUPPORTING DOCUMENTS:

- The State of Florida's Program Application Submission to Assume the Clean Water Act Section 404 Permitting Program; August 20, 2020
Made available to the public online through Docket No. EPA-HQ-OW-2018-0640 in the EPA's Docket Center, available at <https://www.regulations.gov>
 - Letters from the Governor of the State of Florida and the Secretary of the Florida Department of Environmental Protection requesting program approval
 - A complete program description, as set forth in 40 C.F.R. § 233.11
 - A General Counsel's statement, as set forth in 40 C.F.R. § 233.12
 - A Memorandum of Agreement with the Regional Administrator, as set forth in 40 C.F.R. § 233.13
 - A Memorandum of Agreement with the Secretary, as set forth in 40 C.F.R. § 233.14

- Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures
- EPA Response to Comments on the State of Florida's Program Submission Requesting to Assume Administration of a Clean Water Act Section 404 Program, December 16, 2020
- Tribal consultation letters
 - Letter to Alabama-Coushatta Tribe of Texas; October 19, 2020
 - Letter to Coushatta Tribe of Louisiana; October 19, 2020
 - Letter to Miccosukee Tribe of Indians of Florida; December 17, 2020
 - Letter to Mississippi Band of Choctaw Indians; October 19, 2020
 - Letter to Poarch Band of Creek Indians; December 17, 2020
 - Letter to Seminole Tribe of Florida; December 17, 2020
- Response to comment letters to tribes
 - Letter to Choctaw Nation of Oklahoma; December 16, 2020
 - Letter to Miccosukee Tribe of Indians of Florida; December 16, 2020
 - Letter to Muscogee (Creek) Nation; December 16, 2020
 - Letter to Poarch Band of Creek Indians; December 16, 2020
 - Letter to Seminole Tribe of Florida; December 16, 2020
- Programmatic Biological Opinion for U.S. Environmental Protection Agency's Approval of FDEP's Assumption of the Administration of the Dredge and Fill Permitting Program under Section 404 of the Clean Water Act; U.S. Fish & Wildlife Service; FWS Log #: 04E00000-2021-F-0001; 04E00000-2021-B-0001; November 17, 2020 ("Biological Opinion")
- NMFS letter to FDEP concerning NMFS' ESA jurisdiction; April 15, 2020
- EPA letter to NMFS concerning NMFS' ESA jurisdiction; September 2, 2020
- NMFS email to EPA concerning NMFS' ESA jurisdiction; September 3, 2020
- NHPA Programmatic Agreement; December 16, 2020
- NHPA consultation response letters
 - Letter to ACHP; December 16, 2020
 - Letter to FDEP; December 16, 2020
 - Letter to SHPO; December 16, 2020
- EPA Memorandum for the Record regarding Coastal Zone Management Act consistency; December 16, 2020
- EPA Memorandum for the Record regarding Magnuson-Stevens Act consistency; December 16, 2020
- Department of the Army letter to EPA concerning EPA's request for comments on the State of Florida's program submission; November 24, 2020
- NMFS letter to EPA concerning EPA's request for comments on the State of Florida's program submission and concerning Essential Fish Habitat consultation requirements of the Magnuson-Stevens Act; October 30, 2020
- USFWS letter to EPA concerning EPA's request for comments on the State of Florida's program submission and transmitting USFWS Biological Opinion (listed above); November 19, 2020
 - Appended to Biological Opinion: Memorandum of Understanding Between the Florida Fish and Wildlife Conservation Commission, the United States Fish and Wildlife Service, and the Florida Department of Environmental Protection; August 5, 2020

CONCURRENCES:

Acting General Counsel:

Concur: **DAVID FOTOUHI** Digitally signed by DAVID FOTOUHI
Date: 2020.12.16 17:23:26 -05'00'

Disapprove: _____

Date: _____

**Assistant Administrator,
Office of Water:**

Concur: **DAVID ROSS** Digitally signed by DAVID ROSS
Date: 2020.12.16 17:07:25 -05'00'

Disapprove: _____

Date: _____

**Assistant Administrator, Office of
Enforcement and Compliance Assurance:**

Concur: **SUSAN BODINE** Digitally signed by SUSAN BODINE
Date: 2020.12.16 17:14:18 -05'00'

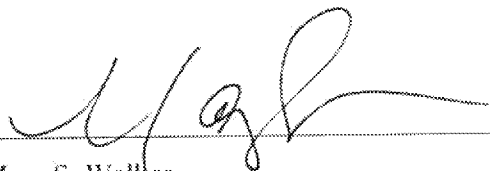
Disapprove: _____

Date: _____

DECISION

That the request from the State of Florida for assumption its State 404 program be approved pursuant to CWA Sections 404 (g) and (h) and as laid out at 40 C.F.R. Part 233.

Regional Administrator



Mary S. Walker

Date: Dec. 17, 2020.

COPIES:

Andrew R. Wheeler,
Administrator